HALIZA SURADEI & ORS

v.

NG ENG LEE

HIGH COURT MALAYA, JOHOR BAHRU
AZHAR MA'AH J
[CIVIL APPEAL NO: 12-29-1999]
16 NOVEMBER 2000

CIVIL PROCEDURE: *Appearance - Notice of appearance - Whether a condition precedent to defending an action - Defendant appearing in person - Subordinate Courts Rules 1980, O. 14 r. 5(1) - Whether counsel for insurance company had locus standi to appear for defendant*

CIVIL PROCEDURE: *Functus officio - Whether judge functus officio - Whether a judgment upon merits*

The defendant's insurance company appointed its own counsel to act on behalf of the insured defendant without filing a notice of appearance. The plaintiff then obtained an interlocutory judgment and a final judgment in her favour. The sessions judge subsequently set aside the said orders and the plaintiff appealed.

The issues for consideration were: (i) whether counsel for the insurance company had the *locus standi* to appear for the defendant as provided for in O. 14 r. 5(1) Subordinate Courts Rules 1980 ('SCR'); (ii) whether the affidavit supporting the insurance company's application was admissible as evidence; and (iii) whether the sessions judge was *functus officio*.

Held:

[1] Order 14 r. 5(1) of the SCR provides that the filing of a notice of appearance is not a condition precedent to defending an action. It was sufficient for the defendant to appear in person on the returnable day to dispute the plaintiff's claim. As such, *locus standi* was not an issue, as it was not imperative for the insurance company's counsel to file a notice of appearance.

[2] Since the insurance company was directly affected, it was the rightful party to state the evidence. The affidavit was admissible as it was based on a police report and posed no prejudice to the plaintiff.

[3] The final order made after the assessment of damages was merely a consequential order that inevitably followed the finding of liability in respect of the accident. The plaintiff's contention that the judgment was a judgment upon merits was therefore unacceptable.

[Plaintiff's appeal dismissed.]

Case(s) referred to:
Evans & Bartlam All ER 646 ***(refd)***
Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 CLJ 1 ***(refd)***
Hock Hua Bank Bhd v. Sabari Murad [1981] 1 MLJ 143 ***(refd)***
L Oppenheim & Co v. V Mohamed Haneef [1922] AC 482 ***(refd)***

Legislation referred to:
Subordinate Courts Rules 1980, O. 14 r. 5(1)

For the plaintiffs - Vijayaletchumi Gopal; M/s Vijaya Gopal & Assoc
For the defendant - Mary Jesmal Preira; M/s Teh Poh Teik & Co

Reported by Raja Vishnu

JUDGMENT

Azhar Ma'ah J:

This is an appeal by the plaintiff against the decision of the Session Court Johor Bahru dated 24 April 1999, setting aside an interlocutory judgment and a final judgment given on 27 June 1997 and 10 January 1998 respectively.

There are three issues central to this appeal. Firstly whether counsel representing the insurance company had any *locus standi* to appear for the defendant in applying to set aside the two judgments in the lower courts. Secondly whether the affidavit supporting the application sworned by an official of the insurance company is admissible as evidence, and lastly whether the Sessions Judge in hearing the application of the defendant had acted correctly by reason of the doctorine of *functus officio*.

As regards the first issue it is submitted for the plaintiff that there being no leave obtained to enter an appearance counsel for the insurance company is not entitled to file the application in question. Reference was made to O. 14 r. 5(1) Subordinate Court Rules 1980 (SCR 1980).

In reply to this proposition counsel for the defendant submitted to the effect that filing of notice of appearance by a defendant who wishes to defend himself against a plaintiff's claim is not imperative. Order 14 r. 5(1) SCR 1980 merely provides:

A defendant who disputes his liability for the whole or part of any claim in the action may:

(a) at any time before the return day serve on the plaintiff a notice of appearance or a defence, as the case may be, for which the notice of appearance to the summons may be used; or

(b) appear on the return day and disputes the plaintiff's claim.

As can be seen from the above passage, filing of notice of appearance is not a condition precedent to defending an action by the defendant. The defendant had the choice of either giving the plaintiff notice of his intention to appear and defend himself against the plaintiff's claim or appear in person on the returnable day to despute the plaintiff's claim.

In the instant case the chronology of events shows that the defendant appeared in person on the returnable date and informed the court of his desire to dispute and defend the action. By his presence in court the defendant had partly complied with the requirement of O. 14 r. 5.

It is the subsequent failure of the defendant's counsel to appear on the date of hearing that prompted the Session Judge to enter an interlocutory judgment against the defendant. Once again on the date fixed for assessment of damages though notified by the plaintiff no counsel showed up to represent the defendant. Hence the final orders.

As for the final judgment it is not to be disputed that on the receiving end of the order is the insurance company.

By virtue of insurance policy, issued by the insurance company which is a contract between the insurer and the insured, the insurance company is legally bound to cover and protect the insured against any claim for damages by a third party. Under this insurance policy, necessarily the rights and liability of the insured is subrogated to the insurer. To give effect to the terms and conditions of the insurance policy it is expedient that the insurance company steps into the shoes of the insured. In the instant case the defendant having showed up in court on the returnable rate and disputed the plaintiff's claim had effectively done what is required of him under O. 14 r. 5.

As the insurance company must necessarily step into the shoes of the defendant I do not see any plausible reason to require the insurance company to file an appearance as this would only mean taking steps backwards and thus further delaying not only the trial process but also the plaintiff's own claims.

In the circumstances the plaintiff's issue no. 1 is unsustainable.

On the second issue, it is submitted for the plaintiff that the affidavit supporting the application had no evidential value as the person who deposed it had no direct knowledge how the accident happened. In reply counsel for the defendant states that the insurance company being directly affected by the order is the rightftil party to state the evidence.

In this connection, my perusal of the affidavit in question revealed that there is no substantial assertion by the deponent as to how the accident occurred. Major parts of the affidavit substantially related the chronology of events preceding the issuance of judgments in question.

In para. 12 and 13 of the affidavit the deponent qualified that his knowledge on this accident was based on the police report.

In the circumstances the use of the affidavit does not in any way cause prejudice to the plaintiff.

Lastly, the issue of doctrine of *functus officio*. Learned counsel for the plaintiff argued that the defendant in filing the application to set aside the interlocutory and final judgments had embarked on a wrong procedure of law. It is proposed that the Sessions Judge after issuing the orders as she did had become *functus officio* and no longer had the jurisdiction to adjudicate on the matter. It is proposed further that the proper procedure to be adopted was to file an appeal to the High Court for the reversal of the orders or otherwise.

Copious authorities were referred by the learned counsel purporting to support the above proposition.

Picking up from these authorities it is further submitted that by reason of assessment of damages having been conducted and decision on it having been pronounced by the Sessions Judge and thereafter perfected the judgment has become final. It is also contended that this final judgment is a judgment on merit as the plaintiff had adduced evidence that led the judge to making the final order in question.

The question that arose from the above contention is whether the final judgment that sprung out of the assessment of damages is a judgment on merit thus bringing the doctrine of *functus officio* into play. With regard to this issue I prefer to take a different approach in finding an answer to it. The final order made after the assessment of damages is merely a consequential order that inevitably followed the finding of liability in respect of the occurance of the accident. Central to the plaintiff's claim of damages against the defendant is the question who was responsible for the accident.

Parties are on common ground that no evidence of any kind was heard by the learned Sessions Judge as to how the accident actually happened before handing down an interlocutory judgment technically putting the entire responsibility on the defendant for the accident.

The assessment of damages is only for the purpose of ascertaining compensation that ought to be paid to the plaintiff following the finding of liability on the defendant.

In the circumstances the contention of the plaintiff that the judgment in question is a judgment upon merits is unacceptable.

To further amplify my above finding on this issue it is worthwhile looking at what the Federal Court has to say in the case of *Hock Hua Bank Bhd v. Sabari bin Murad* [1981] 1 MLJ 143.

> The Court had no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it had been entered ... unless it is a judgment by default or made in the absence of a party at a trial or hearing.

Then the House of Lords in *Evans & Bartlam* All ER 646 held that:

> unless and until the court has pronounced a judgment upon merits or by consent, it is to have the power to revoke the expression of its coercive power that has been obtained only by a failure to follow any of the rules of precedent.

In the case of *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 CLJ 1 the Supreme Court held that a judgment in default is not a judgment on the merits, following the decision of the English Court in the case of *L Oppenheim & Co v. V Mohamed Haneef* [1922] AC 482.

Apart from what has been stated above, my perusal of the pleadings shows that the defendant has successfully raised certain arguable issue that merits the case to go on a normal trial.

For the reasons hereinabove the plaintiff's appeal is dismissed with costs.